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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954

No. 670

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners,

versus

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

We wish to point out some inaccuracies in the counter statement set up by the Respondents on pages 1 and 2 of their Brief. Petitioners never contended that Oscar Green ever operated the properties of James A. Green and Martha Green in the capacity of a trustee. However, they do assert that Oscar Green operated these properties from about July 30, 1935 until on or about September 15, 1936, and that he operated them as one operation without separating and distinguishing the income from each estate. The Petitioners stated this in the amended motion to dismiss and to abate proceedings and for injunctive relief (Tr. 73).

In the counter affidavit in denial or avoidance of this motion to dismiss (Tr. 84-89) the plaintiffs in the District Court at no place denied these allegations on the part of the petitioners and defendants in that Court.

It is true that the amended complaint filed by the plaintiffs in the trial court, strictly speaking, did not specifically ask that Herschel S. Green be removed as the Trustee of the estate of Martha Green.

Let us look at the clever way in which the Respondents handled this matter. In the original complaint they describe both testamentary trusts, and allege wrongful acts in connection with both, and then generally pray for an accounting in each trust estate, but end up with a general prayer for relief. The defendants filed a motion attacking that complaint in which they merely set up the pending case in the Circuit Court of Crawford County. The plaintiffs then filed an amendment to the complaint on January 3, 1952, in which they specifically asked that Herschel be removed as Trustee of the James A. Green trust. On January 9, 1952 they filed their amended complaint. One might well intimate that the Respondents are guilty of the same conduct of which they accuse the Petitioners, that is, relying on a "concealed legal technicality." This amended complaint appears in the Abstract (Tr. 26-34). The Respondents alleged in this complaint, in paragraph XI, that Herschel S. Green had taken possession of the property of both trusts, that he had refused to furnish Respondents with information concerning the trust properties (Paragraph XII), that he had indiscriminately combined his personal items of income and disbursement with those of both of the trusts (Paragraph XIV), that he had wrongfully transferred assets from the James A. Green trust to the Martha Green trust (Paragraph XIX), that he had wrongfully used funds belonging to the James

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A. Green trust for the benefit of the Martha Green trust, and that he had commingled his own funds with the funds of the two trusts in one bank account and had repeatedly withdrawn considerable sums of money from this common bank account for his personal use (Paragraphs XXI and XXII).

It is inconceivable that the Respondents can come into this Court with a straight face and say, after charging this alleged misconduct on the part of Herschel Green in regard to both trust properties, that in the event the allegations were proven they only wanted him removed as Trustee of the James A. Green trust. It amounts to saying that if he were proved dishonest, that he could continue with immunity as far as they were concerned with regard to the Martha Green trust, as long as he was removed as Trustee of the James A. Green trust.

On January 14, 1952 the Court ruled on defendants' motion to dismiss, denying the same on the theory that plaintiffs were seeking jurisdiction of the res in the James A. Green estate, but only personam in the Martha Green estate. On May 7, 1952 the Court ordered an accountant to make an examination of the Martha Green and James A. Green trusts and ordered that the Martha Green trust furnish the money for the payment of the audit (Tr. 49), thus actually dipping into the assets of the Martha Green estate and taking control of them for the first time. On October 27, 1952, attorney for plaintiffs indicated before testimony was started that they were seeking a judgment in res in the James A. Green estate and personam in the Martha Green estate. However, the evidence shown in abstract form (Tr. 51-66) shows that the trusts were operated together as a unit, could not be separated, and the res was so intermingled that even an accounting could not be

made of each as a single unit, and, as a result of that evidence, on the same date, the Court said:

> ". . . , and the parties present evidence to the Court upon the issue of the removal of Herschel S. Green as Trustee in the estates of James A. Green and Martha Green, . . ." (Tr. 64).

The fact remains that Herschel S. Green is still the acting Trustee of the estate of Martha Green and of the estate of James A. Green, subject to the jurisdiction of the Circuit Court of Crawford County, wherein he is still filing reports and must abide by any decision of that Court. Although he did resign in the Federal Court, we contend that that resignation was a nullity. It must be emphasized that this was not done until the trial court had overruled the motion of the defendants to dismiss the case because of lack of jurisdiction. Furthermore, this matter was deliberately brought to hearing by the Respondents a few days before a general election in which the said Herschel S. Green was a candidate for the General Assembly, and the Respondents admitted in the court below in their counter-affidavit that Herschel S. Green submitted his resignation to avoid unfavorable publicity. (Tr. 86.)

This case cannot be argued on the supposition that Herschel S. Green has ever been found liable in an action for an accounting. The issues as to the accounting, both in regard to Herschel S. Green and in regard to his brother, Oscar L. Green, are yet to be determined and it is misleading to make any allegations assuming the facts to be either way on these issues.

The Respondents seem to be arguing like the two headed monster, trying to go in two directions at one time. On page 3 of their brief, in the Summary of Argument, they most emphatically state that the Federal Court was the

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only court to acquire jurisdiction of all the parties in interest and that the Illinois Court had no present jurisdiction of either trust. Then, on page 11 of their Brief, Respondents say that all the beneficiaries are necessary parties to a proceeding to remove a trustee appointed by a will. Again, on page 12, Respondents emphasize that in the suit in the Federal Court all of the beneficiaries and remaindermen were subject to the jurisdiction of the Court, and that the proceeding in the State court was by only one beneficiary, the life tenant, Oscar L. Green. Then, the Respondents turn around and argue that for purposes of diversity of citizenship, Madge Green has only a contingent interest and is not an indispensable party to the suit.

In other words, they contend that the case should not be relegated to the State court because it never had all of the parties before it. However, in the same breath, they contend that Madge Green, for the purpose of determining diversity of citizenship, could be disregarded as not being an indispensable party. The truth of the matter is that Madge Green is an indispensable party to the suit under both doctrines, or she is not an indispensable party under either doctrine. It is strange indeed for the Respondents to now contend that Madge Green is not an indispensable party in view of the allegations of their amended complaint (Paragraph 8, Tr. 28), the allegations of their reply to the new matter in the answer of defendants (Paragraph 2, Tr. 48), and those of the motion of Alice Green to be made a party plaintiff (Tr. 89-90).

Furthermore, Judge Schnackenberg, in his opinion, at page 49 of the Petition for Certiorari, recognized the fact that the Respondents had, throughout the proceedings in the courts below, treated and regarded Madge Green as an indispensable party and had never contended that she was not an indispensable party.

In fact, Respondents even go so far as to obviously misstate the law in Illinois, when they say, on page 12 of their Brief, that the State Court could not remove the defendant trustee, even for cause. Then, on page 23, in arguing that the District Court should not be ousted of jurisdiction, the Respondents argue that if this is done, Herschel S. Green would not be required to restore the money or property allegedly lost because of his malfeasance. Certainly, no one could seriously contend that the Courts of the State of Illinois, wherein all of the trust estate is located, wherein the Trustee resides, could not order an accounting and remove the Trustee if necessary. The Petitioners ask the Court to take judicial notice of the fact that there is a statute of the State of Illinois which provides that non-resident parties can be served by publication in any civil action affecting property within the jurisdiction of the Court. Chapter 110, Section 138, Smith-Hurd Illinois Revised Statutes, State Bar Association Edition 1953. There is no question but what the Respondents can have ample remedy in the Circuit Court of Crawford County in the State of Illinois.

Naturally, the cases vary in Illinois as who are and who are not indispensable parties, depending upon the final disposition of the case. However, it is fundamental law that in Illinois, where the Court obtains jurisdiction by the filing of a complaint and the filing of reports, that Court has complete jurisdiction over the res and the parties involved in order to bring about complete justice. (Maguire v. City of Macomb, 293 Ill. 441, 127 N.E. 682) Naturally, any final order in the case which will affect certain individuals cannot be binding on those individuals unless they are properly before the Court. However, this does not take away from that Court its jurisdiction over the res and over those parties who are properly before the Court. We

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respectfully submit that the Princess Lida case is right in point on this particular issue and that the plaintiffs cannot sidestep the clear holding of this Court in that case.

Petitioners emphatically deny the contention made on page 17 of the Respondents' Brief, that there is no decision in Illinois holding that the filing of an account by a Trustee bestows complete jurisdiction on the Court over all phases of the administration of the trust. Petitioners contend, contrary to the argument of the Respondents, that the doctrine of the Princess Lida case applies regardless of whether or not there is a statute providing for an accounting in the State Court. In Illinois the Circuit Courts have inherent jurisdiction to administer trusts, and in the case of *Maguire v. City of Macomb*, 293 Ill. 441, 127 N.E. 682, cited by the Petitioners in their Petition, the Court said, on page 687 of the Northeast Reporter:

> "Where the Court obtains jurisdiction by reason of the trust it is empowered to determine all questions that might arise in the progress of the case and to do complete justice."

Certainly, in Illinois, a trustee must come into court at his own expense if he wishes to file an account, but he can certainly be forced to file an account in a proper proceeding by the beneficiaries of the trust.

In their argument on diversity of citizenship, Respondents have attempted to lead this Court to believe that the cases in Illinois makes a distinction between a vested remainderman and a contingent remainderman, as to whether or not he is a necessary party to a trust accounting. Petitioners wish to state, most emphatically, that the principal case on this question and one referred to on page 12 of Respondents' Brief is *Butler v. Butler*, 164 Ill. 171, 45 N.E. 426, and therein no distinction is made between a con-

tingent remainderman and a vested remainderman. That case flatly says that in a suit to remove a trustee all of the beneficiaries are necessary parties, and this includes both life beneficiaries and remaindermen. None of the cases cited by Respondents are directly in point. The Respondents, apparently, are again reclassifying the parties in a different way as to whether they are necessary and indispensable in the suit. As a practical matter, the only two persons who have a present interest in either of the two estates are Oscar L. Green and Herschel S. Green. Oscar's sons will take no interest unless they survive their father. Likewise, Madge Green will take no interest if children are born to her and her husband prior to his death. If this question of parties is to be decided solely on the basis of who has a present interest, the case should be reduced to one between Oscar L. Green and Herschel S. Green, as it was in the State Court, prior to the time of the suit in the Federal Court.

Respondents, on page 6 of their Brief, admitted that the reports filed by Herschel Green in the State court included matter pertaining to the James A. Green trust, as well as the Martha Green trust.

Respondents, however, did not point out to the Court that Herschel S. Green filed a report for the period, January 1, 1952 through October 31, 1952. The Petitioners allege in their amended motion to dismiss (Tr. 75) that this report was filed on August 31, 1953. The Respondents, in their counteraffidavit, (Tr. 84-89) nowhere denied this fact. The fact of the matter is, the Trustee, Herschel S. Green, is still filing reports in the Circuit Court of Crawford County. Petitioners disagree with the allegation of Respondents on page 9, that no issue was ever presented in the State court. The plaintiff in that suit, Oscar L. Green, asked for an accounting, and the defendant, Herschel S.

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Green, without an order of court requiring him to do so, voluntarily filed his reports. This was his answer to the petition and these reports having been filed, the Petitioners contend that the doctrine of the case of *Judson, et al. v. First Trust and Savings Bank, et al.*, 238 Ill. App. *531, Cert. Denied by the Ill. Sup. Ct.*, is determining and the court could properly refuse to dismiss the suit at that point. This case appears on pages 14 to 16 in the Petitioners' Petition for Certiorari.

An interesting point, however, is the fact that there was never any order entered on the motion to dismiss made by Oscar L. Green. If he intended to abandon the State court proceeding, it would have been a simple matter to ask the Court for a ruling, whether it was right or wrong, and thus make their position clear in the record. This was not done and although the Respondents state on page 9 of the Brief that the Court never entered its proper order of dismissal, there is nothing in the evidence to show that the motion was even presented for action on the part of the Court.

Even though the defendant, Herschel S. Green, did not file a counter-claim in the State Court, it is well established by the Judson case and others, that when a suit for accounting is filed by a plaintiff, no cross bill is necessary for the defendant to recover any amount which may be found due to him in the accounting action.

The Petitioners strongly resent the allegations made in the Respondents' Brief, especially on page 33, that Madge Green personally benefitted from the alleged wrongdoing on the part of her husband. First of all, there is not one bit of proof that Herschel S. Green has ever wrongfully withdrawn money from either of these trusts. This issue has not been determined as yet. Furthermore, there is no

evidence that Madge Green ever personally benefitted from any such alleged wrongdoing. The Respondents have not even made one allegation in any of their pleadings against Madge Green, concerning the things which they have stated to be the facts on page 33 of their Brief. These allegations have no place in an argument on this case because they are not justified by the pleadings or the evidence.

As a final word, the Petitioners wish to answer the continual charge by the Respondents that the question of lack of jurisdiction of the subject matter, based upon lack of diversity of citizenship, was raised by the Petitioners as a last maneuver in the case. The record will show that the Petitioners raised jurisdiction in three separate motions in the trial court and certainly, all phases of this question were raised in ample time for the Court to consider them all in one order, from which the Petitioners have appealed. The Petitioners contend that cases will show that the question of lack of jurisdiction can be raised at any time, and in fact, if a lack of jurisdiction appears, it is the duty of the trial court to raise the question on its own motion. Respondents have never shown that they suffered any harm due to any alleged untimeliness of these motions.

The Respondents have made no answer to the cases which the Petitioners have pointed out showing the conflict on the law between the various Courts of Appeal in regard to the questions raised in this case. Furthermore, they fail to show that the Court of Appeals did not misapply the law as laid down by this Court. Petitioners ask this Court to resolve these questions.

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CONCLUSION

WHEREFORE, the Petitioners, Madge Green and Herschel S. Green, again respectfully petition this Honorable Court to issue a writ of certiorari directed to the Court of Appeals for the Seventh Circuit commanding said Court to send to this Court a full and complete transcript of the record in said Court, to the end that this cause may be reviewed by this Court, and that the judgment of the Court of Appeals for the Seventh Circuit be reversed and such other relief be granted as to this Court may seem proper.

Dated this 12th day of April, A. D. 1955.

Respectfully submitted,

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